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Nicole Kissane

United States District Court

Southern District Of California

United States Of America,

Plaintiff,

V.

Nicole Kissane,

Defendant.

Case No.: 15cr1928-Lab-02

Honorable Larry Alan Burns  
Courtroom 14a

Date: September 27, 2016

Time: 10:00 A.M.

**Statement Of Facts And Memorandum  
Of Points And Authorities**

### **Introduction**

**A. The indictment fails to allege an essential element as required by the Fifth Amendment and must be dismissed.**

The Fifth Amendment requires that an indictment set forth every element necessary to allege a crime. If it does not, if an element is missing, there is no way to be certain that the Grand Jury considered and found that missing element. The indictment here appears to allege every element of a conspiracy charge under the Animal Enterprise Terrorism Act. But, as explained elsewhere, the conspiracy prong of the statute is overbroad and unconstitutional. Ms. Kissane expects the

1 government may try to rescue the conspiracy charge by importing into it additional  
2 elements from the Act's substantive offenses. Ms. Kissane files this motion to  
3 make clear that the Indictment does not adequately allege those additional elements.

4 The Animal Enterprise Terrorism Act makes it a crime to conspire to 1) travel  
5 in interstate commerce 2) "for the purpose of damaging or interfering with the  
6 operations of an animal enterprise." See 18 U.S.C. § 43. As explained in  
7 Defendant's Motion to Dismiss the Indictment (Overbreadth), the statute sweeps  
8 within its ambit all manner of protected speech and expressive conduct and is  
9 unconstitutional. No court has passed on the constitutionality of the conspiracy  
10 prong of the statute. Those that have considered the constitutionality of the statute  
11 have approved prosecutions only of substantive violations of the Act. See, e.g.,  
12 *United States v. Johnson*, No. 14-CR-390, 2015 WL 1058087, at \*3-\*4 (N.D. Ill.  
13 Mar. 25, 2015)

14 Substantive violations require the additional element under section (a)(2)(A)  
15 that "in connection such purpose" [to damage or interfere with the operations of an  
16 animal enterprise] the accused "[i]ntentionally damage[] or cause[] the loss of any  
17 real or personal property (including animals or records) used by an animal  
18 enterprise." At least one court has held that this section requires damage to tangible  
19 property and effectively limits the scope of the act to non-protected conduct. See  
20 *Johnson*, 2015 WL 1058087, at \*3-\*4.

21 The government, in an effort to rescue the overbroad conspiracy charge, may  
22 abandon its current position and argue that the statute incorporates the section  
23 (a)(2)(A) requirement. Were this correct, and it is not, the indictment would still  
24 be defective because it lacks any allegation that Ms. Kissane agreed to intentionally  
25 damage the property of an animal enterprise *in connection with* a purpose to  
26 interfere with the operations of an animal enterprise. The "connection" is a critical  
27 part of section (a)(2)(A). Such a connection might be intuited. It might be inferred.  
28 But it is not alleged, and there is no way to be certain that the Grand Jury considered

1 and found this nexus. If section (a)(2)(A) is part of a conspiracy charge under the  
 2 statute, the indictment must be dismissed.

### 3 **Argument**

#### 4 **A. The Fifth Amendment allows a defendant to be convicted only on** 5 **charges made by the grand jury.**

6 Under our Constitution, the indictment in a criminal case serves three  
 7 important purposes. First, consistent with requirements of the Sixth Amendment,  
 8 the indictment ensures that a defendant is informed of the “nature and cause of the  
 9 accusation.” *See Hamling v. United States*, 418 U.S. 87, 117 (1974); *Russell v.*  
 10 *United States*, 369 U.S. 749, 763 (1962). Second, it effectuates the Fifth  
 11 Amendment’s prohibition on putting an individual twice in jeopardy for the same  
 12 offense by allowing the defendant to plead any judgment in bar against a subsequent  
 13 prosecution. *Ibid.* Third, the indictment assures that a defendant is convicted only  
 14 of charges considered and found by the grand jury. *See Stirone v. United States*,  
 15 361 U.S. 212, 217 (1960). It is the last of these requirements that is at issue here,  
 16 for the indictment fails to set forth an essential element of the offense, that any  
 17 agreement to intentionally damage an animal enterprise’s property was made in  
 18 connection with a purpose of interfering with the animal enterprise’s operations.

#### 19 **B. The Animal Enterprise Terrorism Act requires that a defendant agree** 20 **to damage property in connection with a purpose to interfere with the** 21 **operations of an Animal Enterprise.**

22 Defendant is charged with conspiring to violate the Animal Enterprise  
 23 Terrorism Act as set forth at 18 U.S.C. §§ 43(a)(1), (2)(C), and (b)(3)(A). To  
 24 determine whether the indictment properly sets forth an offense, one must first  
 25 determine the essential elements of the offense.<sup>1</sup> No decision, reported or  
 26

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27  
 28 <sup>1</sup> Defendant’s Motion to Dismiss Indictment for Overbreadth discusses the proper  
 interpretation of the statute in greater detail.

otherwise, has determined the conspiracy offense's elements, so "[w]e first look to the actual language used and the grammatical construction of the statute." *United States v. Kurka*, 818 F.2d 1427, 1429 (9th Cir. 1987). The relevant portions of the statute read:

(a) OFFENSE.—Whoever travels in interstate or foreign commerce —

(1) for the purpose of damaging or interfering with the operations of an animal enterprise; and

(2) in connection with such purpose—

(A) intentionally damages or causes the loss of any real or personal property (including animals or records) used by an animal enterprise, or any real or personal property of a person or entity having a connection to, relationship with, or transactions with an animal enterprise;

or

(C) conspires or attempts to do so;

shall be punished as provided for in subsection (b).

The government, in its Preliminary Trial Memorandum asserts that conviction of a conspiracy charge under the statute requires only that:

1. There was an agreement between at least two persons:

a. to travel in interstate or foreign commerce;

b. for the purpose of damaging or interfering with the operation of an animal enterprise;

2. The defendant became a member of the conspiracy knowing of one of its objects and intending to help accomplish it; and

3. The offense resulted in more than \$100,000 in damages (increases the statutory maximum to 10 years.)

Government's Preliminary Trial Memorandum ("Trial Memo") at 21. This is the obvious import of the statute's plain language because the antecedent of "so" in (a)(2)(C) is logically and grammatically only the matters set out in (a)(1). This correct interpretation of the statute renders it plainly unconstitutional because it sweeps in all manner of conduct protected by the First Amendment: The statute is

not substantially overbroad, but grossly so. This argument is set out more fully in Defendant's Motion to Dismiss the Indictment for Overbreadth.

As noted above, this motion is filed in case the government argues that the statute can be judicially re-written to require the conspiracy offense set out in (a)(2)(c) to incorporate both (a)(1) and (2). Under this unnatural reading, conviction of conspiracy would require:

1. An agreement between two or more people to both
  - a. Travel in interstate commerce for the purpose of damaging or interfering with the operation of an animal enterprise
  - b. And, *in connection with that purpose*, to intentionally damage or cause the loss of any real or personal property used by an animal enterprise
2. That the defendant knowingly became a member of the conspiracy knowing of its object and intending to help accomplish it.
3. The offense resulted in economic damages.

**C. The indictment fails to allege the essential *mens rea* element that defendant agree to damage property *in connection with* a purpose to interfere with the operations of an Animal Enterprise.**

The relevant portion of the indictment charges:

JOSEPH BUDDENBERG and NICOLE KISSANE, did knowingly and intentionally conspire with each other and with persons known and unknown to the grand jury to travel in interstate and foreign commerce for the purpose of causing physical disruption to the functioning of animal enterprises, to intentionally damage and cause the loss of real and personal property, including, but not limited to, animals and records used by the animal enterprises, and caused economic damage in an amount exceeding \$100, 000.

The indictment alleges an agreement to travel in interstate commerce "for the purpose of causing *physical disruption* to the *functioning* of animal enterprises." (Emphasis supplied.) Read charitably, this may be seen as alleging a "purpose of

1 *damaging or interfering* with the *operation* of an animal enterprise” as required by  
2 subsection (a)(1)(A) and (B) of the statute. The indictment also alleges that the  
3 agreement encompasses a second aim, an intent “to intentionally damage and cause  
4 the loss of real and personal property” of an animal enterprise as required  
5 subsection (a)(2)(A).

6 What the indictment does not allege is that the second aim of the  
7 agreement—to damage or interfere with the operation of an animal enterprise—  
8 was intended in connection with the purpose to damage the operations of an animal  
9 enterprise. This is not a technical or academic defect of no consequence. Imagine  
10 an animal activist damages or causes the loss of animal enterprise property by  
11 freeing minks not out of any intent to interfere with the enterprise’s operations but  
12 out of pity for the caged animals. That same animal activist then flies to  
13 Washington to lobby for a bill that would bar the keeping fur animals in small cages.  
14 *Cf. Cramer v. Harris*, 591 F. Appx. 634 (9th Cir. 2015) (unpublished) (upholding  
15 California’s Proposition 2 which required increased cage sizes for egg-laying hens,  
16 pregnant sows, and veal calves). If passed the bill interferes with the operation of  
17 fur farms, so the activist has traveled in interstate commerce for the purpose of  
18 interfering with the operations of an animal enterprise. But the activist has not  
19 violated the statute because he or she did not free the minks in connection with the  
20 same *mens rea* with which he or she traveled.

21 This element of a connection between an agreement to intentionally damage  
22 animal enterprise property and a purpose to interfere with that animal enterprise’s  
23 operations does not appear anywhere in the indictment here. The section of the  
24 indictment entitled “Means and Method of the Conspiracy” does not contain such  
25 an allegation. In fact, it does not even allege the required purpose. The indictment  
26 states that “The defendants, animal rights extremists, planned multiple cross-  
27 country trips in the summer of 2013 to intentionally cause harm to the fur industry.”  
28 While the government might claim that this amounts to an allegation of the

1 elements set out in (a)(1), traveling in interstate commerce for the purpose of  
2 interfering with the operations of an animal enterprise, it does not. Harming the fur  
3 industry is not the same as “interfering with the operations of an animal enterprise.”  
4 When Khloe Kardashian travels to New York for a photo shoot for PETA’s “I’d  
5 rather go naked than wear fur” ad campaign, she intends to “cause harm to the fur  
6 industry” by dissuading consumers from buying fur.



22 But she has not interfered with the operations of an animal enterprise.

23  
24 At another point in the same section, the indictment alleges “[w]hile on their  
25 trips, the defendants released mink from mink farms and vandalized property  
26 associated with the fur industry,” but nowhere does it allege that the release of mink  
27 was done “in connection with that purpose” of “interfer[ing] with the operations of  
28 an animal enterprise.” And such intent cannot be deduced ineluctably because



1 release of minks could have been motivated by pity for the animals and vandalism  
 2 could have inspired by dislike of those who would cage and electrocute animals.  
 3 *See, e.g.*, Indictment at 3-4 alleging that vandalism was motivated by animal rights  
 4 activists' dislike of individual.

5 Similarly, the recitation of overt acts does not contain the necessary  
 6 allegation of connection to the required purpose. There are numerous allegations  
 7 of causing damage to or loss of animal enterprise property, but there is no allegation  
 8 that this damage was done in connection with a purpose to interfere with the  
 9 operations of an animal enterprise. The element of agreeing to act in connection  
 10 with the purpose required by the statute is missing from the indictment. Without  
 11 this allegation of the required *mens rea*, the indictment is fatally defective.

12 **D. Failure to allege the proper *mens rea* element is fatal to the indictment.**

13 The Ninth Circuit has consistently held that the failure to properly allege the  
 14 exact *mens rea* required by statute renders an indictment defective. For example,  
 15 in *Kurka*, the defendant was charged with violating 18 U.S.C. § 33 which provided  
 16 in pertinent part:

17 Whoever willfully, with intent to endanger the safety of any person on  
 18 board or anyone who he believes will board the same, or with a  
 19 reckless disregard for the safety of human life, damages, disables,  
 destroys, tampers with

20 \* \* \*

any motor vehicle which is used, operated, or employed in interstate  
 or foreign commerce

22 \* \* \*

shall be fined not more than \$10,000 or imprisoned not more than  
 twenty years, or both.

24 *See* 818 F.2d at 1430. The indictment alleged that the defendant with reckless  
 25 disregard for human life damaged a motor vehicle in interstate commerce by firing  
 26 two rifle shots at a Greyhound bus. The Ninth Circuit reversed the conviction  
 27 finding the failure to allege that the defendant acted willfully as required by the  
 28



1 statute and that the indictment was therefore defective. *Id.* at 1431.

2 Similarly, in *United States v. Du Bo*, 186 F.3d 1177 (9th Cir. 1999), the  
3 Circuit reversed a conviction under the Hobbs Act. Though not set out in the act,  
4 case law requires that a defendant act “knowingly or willingly” to be convicted.  
5 *See id.* at 1179. The indictment instead charged Du Bo with “unlawfully” affecting  
6 commerce by the “wrongful” use of force. *Id.* Holding that “such terms do not  
7 connote the proper *mens rea* for a Hobbs Act conviction,” the Circuit found this  
8 defect fatal to the indictment: “Du Bo’s conviction requires reversal because his  
9 indictment fails to ensure that he was prosecuted only “on the basis of the facts  
10 presented to the grand jury....” *Id.* at 1179 (citing *United States v. Rosi*, 27 F.3d  
11 409, 414 (9th Cir.1994)).

12 Failure to allege the *mens rea* required for conviction is the exact defect the  
13 indictment here shows. It is not cured by citation to the statute. *See Kurka*, 818  
14 F.2d at 1431. When such a defective indictment is challenged before trial, the  
15 appropriate remedy is dismissal. *See Du Bo*, 186 F.3d at 1180-81.

### 16 Conclusion

17 Because it fails to allege an essential element of *mens rea*—that the  
18 defendants agreed to damage animal enterprise property in connection with a  
19 purpose to interfere with the operations of such an enterprise—the indictment is  
20 defective. It has been properly challenged before trial and must be dismissed.

21 Respectfully submitted,

22  
23 Dated: July 19, 2016

24 /s/ John C. Ellis

25 Federal Defenders of San Diego, Inc.  
26 Attorneys for Defendant  
27 Nicole Kissane  
28 Email: John\_Ellis@fd.org

**CERTIFICATE OF SERVICE**

Counsel for the Defendant certifies that the foregoing pleading has been electronically served on the following parties by virtue of their registration with the CM/ECF system:

John N. Parmley  
Assistant U.S. Attorney

Michael F. Kaplan  
Assistant U.S. Attorney

Respectfully submitted,

Dated: July 19, 2016

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